No. 25-3175

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MANFRED L.S. NARE and GWLADYS K. NARE, Individually, as Parents, Natural Guardians and Next Friends of M.N., a minor child,

Plaintiffs – Appellants,

vs.

OMAHA DISCOVERY TRUST d/b/a KIEWIT LUMINARIUM, a Nebraska Corporation,

Defendant – Appellee.

Appeal from the United States District Court
for the District of Nebraska, Case No. 8:25-cv-00048
Honorable Joseph F. Bataillon
Senior United States District Judge

DEFENDANT – APPELLEE'S BRIEF

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SUMMARY OF THE CASE

Omaha Discovery Trust d/b/a Kiewit Luminarium ("Luminarium") operates a science museum in Omaha, Nebraska. One of Luminarium's admissions policies provides free admission to members of federally recognized tribes and their household members ("Admission Policy"). Gwladys Nare, Manfred Nare and M.N. ("Appellants") are a family who live in Nebraska and are not currently eligible for the Admission Policy.

On February 5, 2025, Appellants filed a lawsuit against Luminarium alleging the Admissions Policy is racially discriminatory and violates 42 U.S.C. §§ 1981, 1982, 2000a, and 2000a-2 and the Nebraska Consumer Protection Act, Nebraska Rev. Stat. § 1519, et. seq ("NCPA").

Relying on decades of Supreme Court precedent recognizing tribal membership as a political classification, the United States District Court for the District of Nebraska ("District Court") determined that the Admission Policy was not racially discriminatory and dismissed Appellants' claims pursuant to Federal Rule of Civil Procedure 12(b)(6). The District Court concluded Appellants' NCPA claims also failed because Appellants did not assert sufficient factual allegations to support a claim that Luminarium was engaged in an unfair method of competition or an unfair or deceptive act, and race discrimination is not covered by the NCPA.

Luminarium requests that each party be granted 15 minutes for oral argument.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 8th Cir. R. 26.1(A), Defendant-Appellee Omaha Discovery Trust d/b/a Kiewit Luminarium states that it is a Nebraska non-profit corporation. It is not a publicly held corporation or other publicly held entity. No publicly held corporation or other publicly held entity owns 10% or more of stock of Omaha Discovery Trust d/b/a Kiewit Luminarium.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

Appellants commenced this action in the United States District Court for the District of Nebraska alleging Luminarium discriminated against Appellants based on race in violation of 42 U.SC. § § 1981, 1982, 2000a, and 2000a-2 and violated the Nebraska Consumer Protection Act. (App. 4-10 R. Doc. 1, at 1-7.)

On March 6, 2025, Luminarium moved for the dismissal of Appellants' complaint for failure to state a viable claim under Fed. R. Civ. P. 12(b)(6). (App. 11-12 R. Doc. 8, at 1-2.) On October 8, 2025, the District Court granted Luminarium's motion in its entirety and entered judgment in its favor. (App. 21 R. Doc. 8, at 9.) On October 30, 2025, Appellants filed a notice of appeal. (App. 22-23 R. Doc. 21, at 1-2.)

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether a policy granting free admission to politically classified members of federally recognized tribes and their household members invokes the protections against racial discrimination in 42 U.S.C. §§ 1981, 1982, 2000a and 2000a-2. Apposite cases: *Morton v. Mancari*, 417 U.S. 535 (1974), *United States v. Eagleboy*, 200 F.3d 1137 (8th Cir. 1999).

2. Whether Appellants alleged sufficient facts to support a claim that Luminarium engaged in an unfair method of competition or deceptive act under the NCPA. Apposite case: None.

STATEMENT OF THE CASE

In October 2023, Luminarium announced a free admission policy for Indigenous people and their household members. (App. 5-6 R. Doc. 1, at 2-3.) The "Financial Access" portion of Luminarium's website summarized the policy as follows:

> We honor and welcome Indigenous families, recognizing our location on land traditionally occupied and cared for by Native peoples.
>
> Through the Indigenous Peoples Access Policy, we offer complimentary admission to registered members of federally recognized tribes. Indigenous individuals who present a valid tribal identification card enjoy free entry along with their household members.

Financial Access - Kiewit Luminarium

Gwladys and Manfred Nare, a married couple, are Black or African American. (App. 4 R. Doc. 1, at 1). They are the parents of a minor, M.N. (App. 4 R. Doc. 1, at 1.) Appellants allege that they purchased tickets to Luminarium on February 10, 2024. (App. 6 R. Doc. 1, at 3.) Appellants further allege that they presented their

tickets to Luminarium on February 11, 2024, and requested a full refund, which was denied. (App. 6 R. Doc. 1, at 3.)

On February 5, 2025, Appellants filed a lawsuit in the U.S. District Court for the District of Nebraska alleging violations of: (1) 42 U.S.C § 2000a and 2000a-2; (2) 42 U.S.C. § 1981; (3) 42 U.S.C. § 1982; and The Nebraska Consumer Protection Act, Neb. Rev. Stat. § 1601, et seq. (App. 4 – 10 R. Doc. 1, at 1-7.)

On March 6, 2025, Luminarium moved for the dismissal of Appellants' Complaint for failure to state a viable claim under Fed. R. Civ. P. 12(b)(6). (App. 11-12 R. Doc. 8, at 1-2.) On October 8, 2025, the District Court granted Luminarium's motion in its entirety and entered judgment in its favor. (App. 21 R. Doc. 19, at 9.)

SUMMARY OF THE ARGUMENT

The District Court properly dismissed Appellants' claims because the Admission Policy provides a benefit based on political classification, not race. Each federally recognized tribe is a quasi-sovereign entity that determines its own membership criteria. The Supreme Court, therefore, holds that tribal membership is a political classification. There is no cause of action under 42 U.S.C. §§ 1981, 1982, 2000a or 2000a-2 for discrimination based on political affiliation.

Appellants attempt to salvage their claims in multiple ways. First, Appellants incorrectly claim that race is a precondition and requirement for tribal membership.

To the contrary, there are no uniform requirements for tribal membership. Race is not a requirement to join a federally recognized tribe, and many Native Americans are not tribal members. The Admission Policy also includes household members of tribal members, which has no connection to race.

Second, Appellants direct the Court to case law relating to explicit preferences for individuals with Hawaiian ancestry. Those cases are inapplicable for multiple reasons, including the fact that the Admission Policy is not based on Native American ancestry. Further, the circumstances are not similar to the facts of this case.

Third, Appellants argue that the case law that supports Luminarium's position only applies to the federal government. Appellants are wrong. The rights that Indian tribes enjoy as quasi-sovereign entities are not limited to interactions with the federal government, and there is no authority for Appellants' suggestion that tribal membership is a racial classification unless the federal government is involved.

The District Court also properly concluded that the Admission Policy does not constitute an unfair trade practice and that Appellants failed to allege how Luminarium's policy affects the conduct of trade or injured Appellants in their business or property.

For these reasons, the District Court's order should be affirmed.

ARGUMENT AND APPLICABLE STANDARD OF REVIEW

I. STANDARD OF REVIEW

An appellate court reviews "de novo the grant of a motion to dismiss under 12(b)(6)." *Nygard v. City of Orono*, 39 F.4th 514, 518 (8th Cir. 2022). "In analyzing a motion to dismiss, a court must accept the allegations contained in the complaint as true and make all reasonable inferences in favor of the nonmoving party." *Id.* (quoting *Martin v. Iowa*, 752 F.3d 725, 727 (8th Cir. 2014)).

In order to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Vitally, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 557.

II. The District Court Properly Dismissed Appellants' Civil Rights Claims Because the Admission Policy Is Based on a Political Classification, Not Race

Appellants' federal claims are based on civil rights statutes prohibiting race discrimination. (App. 4 – 10 R. Doc. 1, at 1-7.)

- 42 U.S.C. § 1981 guarantees all persons within the jurisdiction of the United States to have the same right to make and enforce contracts as enjoyed by white citizens.
- 42 U.S.C. § 1982 guarantees all citizens of the United States the same rights as enjoyed by white citizens "to inherit, purchase, lease, sell, hold, and convey real and personal property."
- 42 U.S.C. § 2000a prohibits places of public accommodation from discriminating against individuals in the enjoyment of goods, services, facilities, privileges, advantages and accommodations on the basis of race, color, religion, or national origin.

To prevail on any of these claims, Appellants must establish that they were discriminated against **because of** their race. The District Court properly dismissed Appellants' claims because the Admission Policy does not discriminate based on race. Rather, tribal membership is a political classification.

Appellants attempt to evade the dearth of case law supporting the District Court's opinion by falsely claiming that tribal membership is limited to Native Americans and individuals of other races can never join a tribe, directing the Court to inapplicable case law, and arguing that the case law supporting Luminarium's position only applies to situations involving the government. None of Appellants' arguments are availing.

A. Luminarium's Policy Is Based on a Political Classification

Indian tribes enjoy "quasi-sovereign status" in the United States. *Fisher v. District Court*, 424 U.S. 382 at 390 (1976). Under federal law, "Any Indian tribe shall have the right to organize for its common welfare, and may adopt an

appropriate constitution and bylaws, and any amendments thereto." 25 U.S.C. § 5123(a). This includes each tribe's right to determine its membership criteria and modify it at will. *See e.g. Roff v. Burney*, 168 U.S. 218 (1897); *Smith v Babbitt*, 100 F.3d 556, 558 (8th Cir. 1996). Indeed, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, n. 32 (1978).

Because federally recognized tribes are quasi-sovereign entities, tribal membership is frequently viewed as political in nature.

In *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court considered whether it was racially discriminatory for the Bureau of Indian Affairs ("BIA") to provide employment preference to members of federally recognized Indian tribes. The Court rejected the argument that the preference was "racial," instead holding that the preference was political in nature and akin to the requirement that a United States Senator inhabit the State which he represents. *Id.* at n. 24.

Two years later, members of an Indian tribe argued it was racially discriminatory to deprive them of access to the Montana court system in adoption proceedings solely involving other tribe members. *Fisher v. District Court of Sixteenth Judicial Dist.*, 424 U.S. 382 (1976). The Court disagreed, concluding that the Tribal Court had exclusive jurisdiction, and that such jurisdiction "does not

derive from the race of the plaintiff but rather the quasi-sovereign status of the Northern Cheyenne Tribe under federal law." *Id.* at 390-91; *see also United States v. Antelope*, 430 U.S. 641 (1977) (concluding that a criminal statute that applied to tribal members was not based "in whole nor in part upon impermissible racial classifications.")

Consistent with this line of reasoning, this Court upheld a policy of not enforcing the Migratory Bird Treaty Act (MBTA) against tribal members as non-discriminatory. *United States v. Eagleboy*, 200 F.3d 1137 (8th Cir. 1999). The defendant, who was not enrolled in a federally recognized tribe, argued that the policy was racially discriminatory.[1] *Id.* The Court explained, "It matters not to his eligibility for prosecution whether Eagleboy is white, black, yellow, brown or any other hue; all that matters is that he is not a member of a federally-recognized tribe." *Id.* at 1139.

Like the policies and statutes discussed above, eligibility for the Admission Policy is not based on race. Providing free admission to members of federally recognized tribes is based on a political classification. If a Black individual presents Luminarium with evidence that they are a member of a federally recognized Indian

[1] Although the defendant was not a tribal member, he was Native American, which demonstrates that many Native Americans are not members of a federally-recognized tribe.

tribe, that individual would receive free admission. Similarly, if an individual who identifies as Indian or Native American but is not a member of federally recognized Indian tribe requested free admission, the request would be denied. The Admission Policy also goes a step further by covering household members, which has no connection to race.[2]

Appellants also overlook a significant difference between racial classifications and tribal membership. Race is an immutable trait. Tribal membership is not. Like other political groups, tribal members can relinquish their membership, and tribes can disenroll tribal members.[3] Moreover, even if a tribal member is Native American, it does not follow that they are solely Native American. A tribal member who is one quarter Native American may also be Black, white, and/or any other race.

As such, the District Court correctly concluded that the Admission Policy does not violate 42 U.S.C. § 1981, § 1982, § 2000a, or § 2000a-2 and that decision should be affirmed.

[2] By way of example, M.N. would be eligible for free admission if they married and lived with a tribal member in the future.

[3] As noted in Appellants' supplemental briefing to the District Court, "Indians possess the inherent right of expatriation." (Appellee App. 28 R. Doc. 18, at 2.)

B. Appellants Improperly Equate Tribal Membership to Race

Failing to appreciate that tribal membership is a unique, political determination made by each tribe, Appellants incorrectly and unabashedly assert that being Native American is a "precondition and requirement for membership in a federally recognized tribe," distastefully comparing tribal membership to the Knights of the Ku Klux Klan.

Appellants cite **no** authority for their claim that tribal membership is exclusively limited to Native Americans. The only authority Appellants cite regarding the tie between tribal membership and race is a law review article, *American Indian Sovereignty and Naturalization: It's a Race Thing*, 80 Neb. L. Rev. 171 (2001). Nowhere in the article do the authors state that tribal membership is exclusively limited to Native Americans. The focus of that article was "the power to determine membership in Indian nations," and the argument that "there is a racial criteria at the center of federal recognition of membership in an Indian nation, **whenever that membership is raised in the context of which nation's law shall apply to a controversy**." *Id.* p. 173 (emphasis added).

As of December 11, 2024, there were **574** federally recognized Indian tribes. 89 FR 99899 (December 11, 2024). According to the law review article, the Bureau of Indian Affairs does not keep a table or chart of tribal membership criteria.

American Indian Sovereignty and Naturalization: It's a Race Thing, 80 Neb. L. Rev. at 217.

However, it is evident that Appellants are simply wrong in their assertion that one must be Native American to join a tribe. The law review article cites to a partial listing of 155 tribes from 1991, and states that 26 of those tribes did not set any minimum blood requirement.[4] *See also Smith v. Babbitt*, 100 F.3d at 558-59 (referencing "adoption" ordinance in the Mdewakanton Sioux Tribe Constitution); *Roff v. Burney*, 168 U.S. 218 (1897) (noting tribal membership by virtue of marriage and adoption), *Allen v. Cherokee Nation Tribal Council*, 2006 Cherokee JAT LEXIS 7 (March 7, 2006) (unpublished) ("For almost 150 years, the Cherokee Nation has included not only citizens that are Cherokee by blood, but also citizens who have origins in other Indian nations and/or African and/or European ancestry."). While some tribes may require a blood quantum for membership, Appellants' characterization of tribal membership is detached from reality.

C. The Hawaii Cases Concern Preferences Based Exclusively on Ancestry and Have No Bearing on this Dispute

Appellants direct the Court to two decisions regarding preference toward individuals with Hawaiian ancestry, claiming that the decisions support the

[4] It is unclear whether the remaining tribes also permitted membership through adoption, marriage or other mechanism.

proposition that membership in an Indian tribe is based on race. Those cases do not hold that membership in an Indian tribe is based on race, and they are inapplicable to this dispute.

In *Rice v. Cayetano*, the Supreme Court determined that a voting restriction explicitly based on Hawaiian ancestry violated the Fifteenth Amendment. 528 U.S. 495 (2000). Under the statute, voting was limited to "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778[5], and which people thereafter have continued to reside in Hawaii." *Id.* at 509.[6]

The Court determined that ancestry was a proxy for race discrimination based on the facts before the Court. *Id.* It did not hold that ancestry is **always** a proxy for race discrimination. In reaching its conclusions, the Court explained that the residents of Hawaii in 1778 were not of "diverse ethnic backgrounds and cultures," rather "Hawaii was isolated from migration" and "[t]he inhabitants shared common physical characteristics." *Id.* at 514-515. The Court also traced the history of the

[5] 1778 is the year during which the "first Western contact with the Hawaiian islands occurred." *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827, 830 (9th Cir. 2006).

[6] *Doe v. Kamehameha Schools/Bishop Estate* involved a school admission policy that gave preference to students of "native Hawaiian ancestry." 416 F.3d 1025 (9th Cir. 2005). The school did not contest that its admission process was "based upon an express racial classification." *Id.* at 1029. The Ninth Circuit reversed the panel decision relied upon by Appellants. 470 F.3d 827 (9th Cir. 2006).

statute and noted that the reference to "aboriginal peoples" meant "the races inhabiting the Hawaiian Islands, previous to 1778." *Id.* at 516. The Court concluded that the legislation at issue "used ancestry as a racial definition and for a racial purpose." *Id.* at 515.

Rice is plainly distinguishable from this dispute. Appellants' claims involve the cost of admission to a privately owned public accommodation, not a fundamental right under the Constitution. Furthermore, the Court found that Indian tribes differed from the State of Hawaii. The State of Hawaii argued that a purpose of the voting law was to afford Hawaiians a measure of self-governance, similar to that of Indian tribes in *Mancari*. *Id.* at 520. The Court determined that *Mancari* could not be extended to a State's voting scheme for public officials. The Court reasoned that "[i]f a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affairs of a quasi-sovereign," while the elections at issue were the affair of the State of Hawaii and subject to the Fifteenth Amendment.

The Admission Policy is not like the statute in *Rice* or the policy in *Kamehameha Schools*, as it does not provide a benefit explicitly and exclusively based on Native American ancestry.[7] It is tied to tribal membership. There are no

[7] The Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) is similarly inapplicable, because it involved preferences based explicitly on race.

universal criteria for tribal membership, because the decision is left to the discretion of each tribe. As explained above, tribal constitutions may allow membership to non-Native Americans through adoption, marriage or other mechanisms. Further, the Admission Policy extends to individuals who reside with a tribal member, regardless of race or tribal membership status.

D. The Political Classification of Tribes Applies Beyond the Federal Government

Appellants argue that the authority recognizing tribal membership as a political classification only applies to the federal government and is derived through the federal government's special trust relationship with tribes. The District Court considered and properly rejected the same argument. (App. 16-17 R. Doc. 19, at 4-5.) As the District Court explained, this Court held that the policy in *Eagleboy* distinguished between persons on the basis of tribal membership, not race. (App. 16 R. Doc. 19, at 4); *United States v. Eagleboy*, 200 F.3d 1137, at 1138. The government's special obligations toward Indians provided additional, independent grounds to uphold the policy in *Eagleboy*. *Id.*

Courts have also acknowledged the political nature of tribal membership outside of government programs for Indian tribes. As noted above, in *Fisher*, the Court found that tribal jurisdiction over an adoption dispute was rooted in the "quasi-

sovereign status" of the tribe, not race. *Fisher*, 424 U.S. at 390. Tribes are political in nature regardless of whether the government is a party to the interaction.

III. The District Court Properly Dismissed Appellants' Nebraska Consumer Protection Act Claim

The District Court properly dismissed Appellants' Nebraska Consumer Protection Act ("NCPA") claim for failure to state a claim under which relief can be granted. To plead a claim for recovery under the NCPA, Appellants must allege facts showing: (1) Appellee engaged in an act or practice that constitutes an unfair method of competition or a deceptive trade practice in the conduct of any trade or commerce; (2) Appellee's conduct affected the public interest; and (3) Appellants were injured in their business or property by Appellee's unfair method of competition or deceptive trade practice . . ."[8] *See Salinas v. Int'l Bhd. of Teamsters*, No. 8:24CV357, 2025 U.S. Dist. LEXIS 165273, at *12 (D. Neb. Aug. 26, 2025) (unpublished) (quoting *WWP, Inc. v. Wounded Warriors Family Support, Inc.*, 628 F.3d 1032, 1042

[8] Case law varies regarding whether a plaintiff must show a fourth element of actual damages. Compare *WWP, Inc.* 628 F.3d at 1042 *with Bassett v. Credit Bureau Servs.*, 554 F. Supp. 3d 1000, 1018 (D. Neb. 2021). In *Bassett*, the District Court noted that the NCPA "provides persons who are injured by deceptive trade practices the right to sue "to enjoin further violations, to recover the actual damages sustained, *or* both." 554 F. Supp. 3d at 1018. To the extent this Court determines Appellants must show actual damages, Appellants cannot do so. Appellants' alleged "loss of dignity, emotional harm, the deprivation of their federal civil rights" are not actual or quantifiable losses.

(8th Cir. 2011)). Appellants allegations do not satisfy any elements of their NCPA claim.

A. Luminarium Did Not Engage in an Unfair Method of Competition or an Unfair or Deceptive Act Under The NCPA

Appellants seemingly argue that Luminarium's refusal to reimburse their admissions tickets constitutes an unfair act because it was racially discriminatory. This argument is wholly unsupported.

As an initial matter, Luminarium's refusal to reimburse Appellants' admission tickets was not racially discriminatory. As discussed above, Appellee's Admission Policy provides free admission to members of federally recognized tribes and their household members, a political classification. The District Court agreed, stating: "[s]ince tribal membership is a political classification, the [Appellants'] factual allegations do not lead to a plausible inference that the denial of a refund was racial discrimination." (App. 18-19 R. Doc. 19, at 6-7).

The Admission Policy also does not constitute an "unfair" practice under applicable law. In *State ex rel. Stenberg v. Consumer's Choice Foods, Inc.*, 276 Neb. 481, 489 (2008), the Nebraska Supreme Court adopted the following "unfairness" framework:

> [T]he plaintiff must prove the practice either (1) fell into some common-law, statutory, or other established concept of unfairness or (2) was immoral, unethical, oppressive, or unscrupulous. In addition, the plaintiff must show that the

> promisor had no intent to perform the promise when it was made and the plaintiff must prove that the practice possessed the tendency or capacity to mislead, or created the likelihood of deception.

Id. (*citing RAAD v. Wal-Mart Stores Inc.*, 13 F. Supp. 2d 1003, 1014 (D. Neb. 1998)) (internal quotes omitted). Applying this standard, the District Court held that a business violated the NCPA when it deceptively misled consumers into believing a freezer would cost "nothing extra," when in reality the customers paid more than $4,000 for it. *Consumer's Choice Foods, Inc.*, 276 Neb. at 489. Nothing in this case resembles that conduct.

Here, the Admission Policy does not fall within any established concept of unfairness, nor does it possess the tendency or capacity to mislead. It is a transparent and lawful pricing distinction—one that is common across Nebraska and widely accepted in ordinary commerce. For example:

- The Nebraska History Museum's Community Access Program provides free admission to qualifying churches. *Community Access Program.* Available at: https://history.nebraska.gov/museum/community-access-program/ (Accessed: 02 February 2026).

- Numerous Nebraska restaurants offer discounted or free meals for children. *See, for example,* https://ohmyomaha.com/kids-eat-free/.

- The Joslyn Art Museum in Omaha allows free admission to ticketed exhibits for individuals 12 and under. *Visit Detail*. Available at: https://joslyn.org/visit/visit-detail/ (Accessed: 02 February 2026).

- The Henry Doorly Zoo uses age- and military-status-based admission pricing. *Hours and Admission*. Available at: https://www.omahazoo.com/hours-and-admission (Accessed: 02 February 2026).

- Many Nebraska retailers offer discounts to students and teachers. *See, for example,* https://www.nbcnews.com/select/shopping/best-teacher-discounts-rcna100002.

- Individuals with a University of Nebraska Medical Center ID badge receive free museum admission and other commercial discounts. *See* Kalani Simpson, *UNMC ID badge offers an array of discounts and perks*, University of Nebraska Medical Center (July 7, 2025), https://www.unmc.edu/newsroom/2025/07/07/unmc-id-badge-offers-an-array-of-discounts-and-perks-2/.

- Costco limits in-store shopping privileges to members only. *Frequently Asked Questions.* Available at: https://www.costco.com/f/-/join-costco (Accessed: 02 February 2026).

These age-based, occupation-based, membership-based, employer-affiliation-based, and religious-access benefits may be viewed as "unfair" by non-qualifying consumers, but they are not "unfair" practices under the NCPA.[9] The Act does not prohibit non-deceptive, publicly stated, and transparently applied pricing distinctions. Accordingly, the Admission Policy falls outside the NCPA reach.

[9] Appellants' hypothetical regarding a race-based pricing discount would also not be a prohibited practice under the NCPA. While arguably unscrupulous—and potentially unlawful under other state and federal laws—the discount would not possess the tendency or capacity to mislead or create the likelihood of deception.

Appellants also argue, without support, that "fairness is a question for the finder of fact." Applicable case law provides that "what is an 'unfair [or deceptive] trade practice' is 'largely left to the courts to decide on a case-by-case basis.'" *Bassett v. Credit Bureau Servs.*, 554 F. Supp. 3d at 1017. Following this, the District Court determined that Appellants did not show Appellee engaged in an unfair practice and properly dismissed Appellants' NCPA claim.

B. The Admission Policy Does Not Affect the Public Interest

Appellants contend on appeal that the denial of their reimbursement request is covered by NCPA because "racial discrimination…affects public interest." Appellants' contention misapprehends Nebraska law. As the District Court properly stated, "Nebraska has never recognized racial discrimination as an unfair practice under the NCPA." (App. 19 R. Doc. 19, at 7, citing *Nelson v. Lusterstone Surfacing Co.*, 605 N.W.2d 136 (Neb. 2000)).

Appellants' contention also fails because the relevant inquiry is whether the practice at issue affects public interest, not whether there is a public interest in prohibiting or controlling such practice. *See Nelson*, 605 N.W.2d 136. In *Nelson*, the Nebraska Supreme Court clarified that the NCPA applies only to conduct that "affects the public interest," not private transactions between individuals. 605 N.W.2d at 139. The Court held that the transaction at issue—a fraudulent private sale of an automobile—did not sufficiently indirectly or directly impact the public

and, therefore, fell outside the scope of the NCPA. *Id.* In support of this holding, the Court explained:

> Were we to hold otherwise, where would the line be drawn? Theoretically, the CPA would apply to every single transaction in which there was an alleged unfair or deceptive act or practice. It would even apply to transactions in the context of flea markets or garage sales. We conclude that the Legislature did not intend such a result when it adopted 1974 Neb. Laws, L.B. 1028, as an antitrust measure to protect Nebraska consumers from monopolies and price-fixing conspiracies.

Id. at 142.

Similar to *Nelson,* Appellants cannot show that their reimbursement request denial or the Admission Policy sufficiently indirectly or directly impact the public. As discussed above, Nebraska institutions routinely offer discounted or free access based on age, occupation, membership, employment affiliation, military service, SNAP/EBT status, etc. These benefits do not adversely impact the public because they are ordinary, non-deceptive business practices that consumers universally understand and encounter—not a practice harming the public or creating widespread consumer injury. Thus, Appellants cannot establish the second element of their NCPA claim.

C. Appellants Did Not Suffer a Concrete Injury In Fact

The District Court properly determined that Appellants failed to show that the Admissions Policy "injured [Appellants] in their business or property." (App. 20 R. Doc. 19, at 8.) An injury in fact requires a concrete, actual, and non-speculative

injury to a consumer's "business or property." *WWP, Inc.*, 628 F.3d at 1042. Appellants purchased admission tickets, used those tickets, and received full access to Luminarium's services. Unlike the consumers in *State ex rel. Stenberg*, Appellants were not charged undisclosed fees or misled about the price. Subjective disagreement with who qualifies for a discount is not a legally cognizable injury. Appellants cannot establish the third element of their claim and, therefore, the District Court properly dismissed the NCPA claim for failure to state a claim under which relief can be granted.

CONCLUSION

For the above reasons, Appellee respectfully requests that the Court affirm the District Court's dismissal of Appellants' Complaint on all claims.

Dated: February 13, 2026

Respectfully submitted,

/s/ Catherine A. Cano

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 4,776 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using **Microsoft® Word for Microsoft 365 MSO (Version 2512 Build 16.0.19530.20226) 64-bit** in 14 point Times New Roman.

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/s/ Catherine A. Cano

CERTIFICATE OF SERVICE

Now on this 13th day of February 2026, the undersigned certifies that she filed the above and foregoing with the Clerk of the United States Court of Appeals for the Eighth Circuit using the CM/ECF case management system which sent notice to all counsel of record.

/s/ Catherine A. Cano
Catherine A. Cano

4910-8868-1871, v. 2